

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT B
(Memorandum Decision dated March 8, 2022)



Signed and Filed: March 8, 2022

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:) Bankruptcy Case
PG&E CORPORATION,) No. 19-30088-DM
)
- and -) Chapter 11
)
PACIFIC GAS AND ELECTRIC COMPANY,) Jointly Administered
)
Reorganized Debtors.)
)
☐ Affects PG&E Corporation)
☐ Affects Pacific Gas and)
Electric Company)
☒ Affects both Debtors)
)
* All papers shall be filed in)
the Lead Case, No. 19-30088 (DM).)
)
)

**MEMORANDUM DECISION REGARDING DISPUTE BETWEEN DEBTORS AND THE
CALIFORNIA DEPARTMENT OF WATER RESOURCES**

On March 2, 2022, the court heard oral argument regarding
California Department of Water Resources' Motion for Order
Determining that The Castle Rock Agreement with PG&E Cannot be
Assumed and that The Department of Water Resources' Claim No.
78104 be Paid (the "DWR Motion") (Dkt. 11887) and the Motion of

1 the Reorganized Debtors for Entry of an Order Modifying Plan
2 Injunction and Compelling Arbitration of Claim of California
3 Department of Water Resources (the "Debtors' Motion") (Dkt.
4 11896), together with the accompanying memoranda, declarations
5 and other filings.

6 Having considered the matters fully, the court concludes
7 that the DWR Motion should be GRANTED and the Debtors' Motion
8 should be DENIED.

9 Long before these bankruptcy cases were filed, the dispute
10 between these opposing parties was identified and framed, and
11 either side could have initiated the arbitration procedures of
12 the 1984 Cotenancy Agreement ("Agreement"). Neither did. Even
13 after the petitions were filed on January 29, 2019, that
14 procedure was available, either by DWR, perhaps after first
15 seeking relief from stay, or by Debtors. Again, neither pursued
16 that procedure.

17 All that changed when the Debtors' Plan of Reorganization
18 (the "Plan") was negotiated, filed, considered and confirmed.
19 As pointed out by DWR, specific provisions were inserted into
20 the Plan and the Order Confirming the Plan (the "OCP") to deal
21 with and reserve for later resolution very numerous open issues
22 relating to executory contracts between Debtors and many
23 governmental agencies, including DWR.

24 Among the most relevant of them are:

25 34. Determination of Cure Disputes.

26 a. Pursuant to Section 8.2(c) of the Plan, **in the event**
27 **of an unresolved dispute regarding** (i) any Cure Amount,
28 (ii) the ability of the Reorganized Debtors or any
assignee to provide "adequate assurance of future
performance" (within the meaning of section 365 of the

1 Bankruptcy Code) under the executory contract or
2 unexpired lease to be assumed, or **(iii) any other matter**
3 **pertaining to assumption, assumption and assignment, or**
4 **the Cure Amounts required by section 365(b)(1) of the**
5 **Bankruptcy Code (each, a "Cure Dispute"), such Cure**
6 **Dispute shall be resolved by a Final Order of the Court,**
7 which may be entered after the Effective Date. (emphasis
8 added).

67. Governmental Performance Obligations.

6 d. Notwithstanding anything in this Confirmation Order,
7 the Plan, or the Plan Documents, the listing of a matter
8 as an "executory contract" or an "unexpired lease" in
9 the Debtors' schedules or Plan Documents (a "Potentially
10 Assumed Contract/Lease") is without prejudice to any
11 contention by any Governmental Unit that the matter is
12 not in fact an executory contract or unexpired lease as
13 set forth in section 365 of the Bankruptcy Code. With
14 respect to any Cure Amount for a Potentially Assumed
15 Contract/Lease for which the United States or any
16 department, agency, or instrumentality of the State of
17 California (collectively, the "Governmental Parties") is
18 listed as the Non-Debtor Counterparty, all parties
19 reserve all rights to dispute such Cure Amount. **If any**
20 **Governmental Party disputes (i) that any Potentially**
21 **Assumed Contract/Lease is in fact an executory contract**
22 **or unexpired lease** or (ii) any Cure Amount, such
23 Governmental Party shall have no later than ninety (90)
24 days after the Confirmation Date (or such later date as
25 may be mutually agreed upon between the applicable
26 Governmental Party and the Debtors or Reorganized
27 Debtors) to file and serve an objection setting forth
28 such dispute, and **any such dispute shall be resolved by**
the Bankruptcy Court. (Emphasis added).

21 DWR is adamant that after it gave its notice of termination
22 of its participation in the Agreement on June 30, 2018,
23 effective one year later, there was nothing left for it to do or
24 for Debtors to assume. All that remains is for Debtors to pay a
25 refund of \$101,026.75, now reflected in Proof of Claim No. 78104
26 that is presumptively allowed and has not been the subject of an
27 objection.

1 Debtors take a contrary view, reflected as early as when
2 the court was considering confirmation of the Plan. Debtors
3 filed their *Schedule of Executory Contracts and Unexpired Leases*
4 *to be Assumed Pursuant to the Plan and Proposed Cure Amounts*
5 attached to the Plan Supplement as Exhibit B ("Cure Notice")
6 (Dkt. 7037).

7 That lengthy schedule included the Agreement. Thus, even
8 to the present date, Debtors maintain that the Agreement was
9 subject to assumption because it was not rejected, and the
10 resolution of the remaining dispute that is the subject of the
11 present motions is part and parcel of the entire bundle of
12 rights and obligations of the parties that must be resolved
13 through arbitration.

14 Given the very specific attention given to matters that
15 plainly include the present dispute, the court is satisfied that
16 the Plan and the OCP reserving jurisdiction in this court to
17 resolve them prevail over those relied on by Debtors to require
18 the court to order arbitration.

19 In *In re Thorpe Insulation Co.*, 671 F.3d 1011 (9th Cir.
20 2012), the court established the principles that guide
21 bankruptcy courts in dealing with arbitration provisions versus
22 bankruptcy alternatives. Those principles convince this court
23 to exercise its discretion not to order arbitration at present.

24 *Thorpe* involved a very complex reorganization of an
25 asbestos mass torts case and the implementation of 11 U.S.C. §
26 524(g). It was a dispute of massive proportions and was
27 obviously quite critical to the outcome of the bankruptcy as a
28 whole.

1 In contrast, Debtors would not have been in bankruptcy at
2 all but for the tragic wildfires of 2015, 2017 and 2018, none of
3 which have anything to do with the present dispute. It is easy
4 to assume that had those fires not occurred, no bankruptcy court
5 would have been called upon to deal with the present dispute
6 with DWR.

7 The determination of whether the Agreement is an executory
8 contract that may be assumed, and if so under what circumstances
9 and leading to what consequences, is clearly a core matter for
10 determination unless the arbitration option is more appropriate.
11 The core question is not a dispositive factor, but one that
12 should be considered. *Thorpe* taught that “[i]n core proceedings,
13 by contrast, the bankruptcy court at least when it sees a
14 conflict with bankruptcy law, has discretion to deny enforcement
15 of an arbitration agreement.” *Thorpe* 671 F.3d at 1021 (citations
16 omitted).

17 The Ninth Circuit agreed with other circuit courts that
18 permit bankruptcy court discretion to decline enforcement or
19 otherwise applicable arbitration provisions “only if arbitration
20 would conflict the underlying purposes of the Bankruptcy Code.”
21 *Id.* (citations omitted). Had either party initiated arbitration
22 after DWR gave its notice of termination in 2018 but before the
23 bankruptcy, there is no doubt that such course would have to be
24 followed. Even if either party had sought to do so after
25 bankruptcy, but before consideration of the Plan, the same
26 result appears likely.

27 Regardless of what could have happened, Debtors chose to
28 reserve the disposition of this dispute as a post-Confirmation

1 matter as indicated above. While this court is not unmindful of
2 the tremendous complexity of the reorganization effort, and even
3 the complexities encountered apart from the wildfire problems,
4 Debtors still made an election of how best to proceed. They
5 could have excluded the Agreement from the list of matters to be
6 disposed of later but did not. Thus, the deferral of resolving
7 the issue through the plan mechanisms was a conscious choice.

8 *Thorpe* stated:

9 "Arbitration of a creditor's claim against a debtor, even
10 if conducted expeditiously, prevents the coordinated
11 resolution of debtor-creditor rights and can delay the
confirmation of a plan of reorganization."

12 *Id.* at 1023.

13 There was no delay in consideration of the Plan and its
14 subsequent confirmation and implementation. The court cannot
15 ignore that conscious choice of the Debtors to proceed under the
16 procedures and reservations they established and which DWR and
17 other governmental agencies responded by their reservation of
18 rights as noted.

19 Even though this issue is presented to the court nearly two
20 years after the Plan was confirmed, there is still a risk that
21 an outcome achieved via arbitration, at least on the issues of
22 whether the Agreement was to the reserved assumption provisions
23 of the Plan at all, and whether DWR could be required to pay
24 anything after it gave its notice of termination, would conflict
25 with those policies articulated by *Thorpe* and memorialized in
26 the Plan and the OCP.

27 Under the circumstances presented, and consistent with the
28 admonitions of *Thorpe*, the court prefers to exercise its

1 discretion and keep that dispute here. If the outcome is as DWR
2 hopes, the matter is over, subject only to the possibility of
3 appellate review. If the outcome favors Debtors, the question
4 of liquidation of the amount of damages to be paid by DWR may be
5 more appropriately determined through arbitration.

6 There are no material facts in dispute regarding whether
7 DWR should or should not be ordered to pay its share of the net
8 loss upon termination of the Agreement. DWR looks to Section
9 14.5 of the Agreement to insulate it from such a charge because
10 the other parties continued to operate under it. Debtors rely
11 on Section 14.7 to hold DWR responsible for its share for
12 termination in the future.

13 Collateral to that, and of relatively minor importance, is
14 whether Claim No. 78104 should be paid. So far Debtors have not
15 asserted any substantive objection to it, but maintain that if
16 they prevail on the termination issue that would represent
17 little more than a minor offset in DWR's favor.

18 It is now time to put this dispute to rest. Debtors have
19 until March 25, 2022, to file a memorandum, not to exceed twenty
20 pages and limited to this discrete issue described above, in
21 support of their position. DWR has until April 8, 2022, to file
22 a reply memorandum, not to exceed twenty pages and similarly
23 limited. After that the matter will stand submitted unless the
24 court decides to consider oral argument.

25 If the decision is that DWR prevails, then that should be
26 the end of it, subject only to Debtors paying Claim No. 78104.
27 If Debtors prevail on that discrete issue, the court will
28 revisit the question of the amount DWR's future liability upon

1 termination should be determined through arbitration or via a
2 damages trial in this court.

3 The court is concurrently issuing orders consistent with
4 this Memorandum Decision.

5 ****END OF MEMORANDUM DECISION****
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28